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90-857

NO. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

MARC GILBERT DOGGETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

WM. J. SHEPPARD
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ATTORNEYS FOR PETITIONER

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

vs. Case No. 80-11-Cr-J-16

MARC GILBERT DOGGETT, and
LUIS EDWARD ORTIZ-CRISTONCHO
_____/

REPORT AND RECOMMENDATION

I. STATUS

Defendants, Marc Gilbert Doggett, and Luis Edward Ortiz-Cristoncho, filed Motions to Dismiss with prejudice the indictment returned in this case on February 22, 1980. Both Defendants contend that their arrest in September 1988 and subsequent prosecution pursuant to the 1980 indictment violates their right to a speedy trial under the Sixth Amendment of the United States Constitution.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Special Agent Douglas R. Driver, with the Drug Enforcement Agency (DEA), worked undercover in a drug investigation from November 1979 - January 1980. Agent Douglas testified before the Grand Jury regarding the results of his investigation on February 22, 1980, when an indictment listing multiple defendants was returned and sealed.

Agent Driver testified that the defendants were located in different geographical areas and wanted them arrested simultaneously.[1] In an effort to accomplish this goal and other objectives, on February 22, 1980, a memorandum from the office of the United

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[1] Agent Driver testified that many of the major defendants were outside of the United States and attempts were being made to lure them into the United States.

States Attorney was sent to the United States Marshal directing them to refrain from making arrests under the indictment because DEA would be making the arrests. Agent Driver testified that he believed it generally was a nationwide policy (unwritten) for DEA to make the initial attempt to arrest individuals that they had investigated to protect potential evidence, the safety of the U.S. Marshals, and to prevent duplicated efforts.

FACTS SURROUNDING THE SEARCH AND WHEREABOUTS OF MARC GILBERT DOGGETT

Agent Driver testified that on March 19, 1980, efforts were made to arrest Doggett in Raleigh, North Carolina. Agent Driver testified that he learned from his telephone conversations with the two agents who attempted to arrest Doggett (Charles

Overton, with the North Carolina State Bureau of Investigations, and Officer Larry Rawlins, Wake County Alcohol Beverage Control), that they went to the residence of the parents of Doggett and talked with his mother. See exhibit #2. Agent Driver testified that the two agents told Doggett's mother about the arrest warrant to which she responded by telling them that her son had left four days earlier to go to Colombia to purchase cocaine and that she hoped that he would get arrested to get him out of that business. She also advised the agents that she would notify them if he came home.[2]

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[2] This testimony was corroborated by Defendant's mother, Leonor Doggett Pinzon. However, she denied telling the agents that her son had gone to Colombia to purchase cocaine. She testified that she did not know her son was involved in (Footnote Continued)

On March 18, 1980, pursuant to this information, Agent Driver had Doggett entered into the text computer which would alert all United States Customs Stations that Doggett was wanted pursuant to an arrest warrant. See exhibit #1. However, unknown to Agent Driver, Doggett was subsequently taken off the text computer on May 2, 1980. See exhibit F. Agent Driver testified that he did not request that the information be taken off the text computer and only guessed that they had a standard procedure to cancel them out of the text computer after a certain number of days.

(Footnote Continued)
cocaine and told the agents that her son had gone to Colombia with his cousin William Doggett to purchase emeralds and for spring vacation. She also testified that she supplied the agents with her son's flight number and told them he
(Footnote Continued)

Agent Driver testified that he filled out a fugitive declaration form (see exhibit A) on March 18, 1981, concerning Doggett which caused him to be placed into the National Crime Information Center computer (NCIC)[3] on April 2, 1981. See exhibit #4. Agent Driver testified that the submission of the fugitive declaration form routinely will cause the individual to be placed into the DEA, text (customs), and NCIC computers. Agent Driver testified that his failure to have Doggett entered into NCIC sooner was caused by his erroneous assumption that Doggett would also be entered into NCIC and all other relevant

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(Footnote Continued)
would be applying for a passport in Miami.

[3] NCIC alerts law enforcement officers if someone they have arrested is wanted in another jurisdiction who
(Footnote Continued)

computers when he was put into text on March 18, 1980. Agent Driver testified that he immediately corrected the problem when it came to his attention.

Agent Driver testified that on September 21, 1981, he received either a teletype or telephone call from Agent Leonard Williams, the DEA agent in charge of operations in Panama, informing him that Doggett had been arrested on drug charges by Panamanian authorities. Agent Driver testified that he requested Agent Williams to initiate proceedings with Panamanian officials to have Doggett expelled to the United States for trial.[4] Agent Driver testified that Agent Williams

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(Footnote Continued)
has entered that person's identification into NCIC.

[4] Agent Driver testified that (Footnote Continued)

submitted a written request for Doggett's expulsion on September 21, 1981; and subsequently on October 15, 1981, Agent Williams received a response from the Attorney General's office in Panama concurring in his request for Doggett's expulsion. See exhibit #5 (Agent William's "DEA-6", a case report). Agent Driver testified that Agent Williams had told him that expulsion has worked in previous occasions. Agent Driver testified that no attempts were made to formally extradite Doggett.

Agent Driver testified that Agent Williams left Panama in July 1982.

(Footnote Continued)
expulsion is an informal arrangement between the United States and Panama, where Colonel Noriega determines the United States fugitive is undesirable and orders the individual to be turned over to the appropriate United States authorities.

Agent Driver testified that he never did communicate with Agent William's successor concerning the status of Doggett. Agent Driver testified that he just assumed that Doggett received a 10 - 15 year sentence and would serve it. Agent Driver testified that American citizens usually serve longer sentences than Panamanian citizens.

The record reflects that on January 6, 1984, Agent Driver submitted a "DEA-6" stating that Doggett was presently in custody in Panama and that Panamanian authorities have been requested to expel him to the United States to stand trial. See exhibit B. The record also reflects that Agent Driver made similar case reports on July 18, 1984, and March 10, 1985, containing the same information. See exhibits C and D. Agent Driver testified that he

based these reports on information he had previously received from Agent Williams when he was stationed in Panama.

In August 1985, Agent Driver was transferred to Panama. Agent Driver testified that one of the first things he did was check with Panama enforcement authorities who thought Doggett had already been released. Agent Driver testified that he learned of papers that were found on Doggett when he was arrested by Panama officials which indicated that he had been living in Bogota, Colombia. Agent Driver testified that he just assumed that Doggett went back to Colombia when he was released from custody in Panama to avoid his arrest in the United States.

A document faxed from the State Department consulate in Panama indicates

that Doggett was released on July 15, 1982, by order of the Sixth District Court of Panama and that Doggett informed the consulate that he planned to return to Colombia.[5] See exhibit #10. There is no evidence that this information was ever forwarded to anyone at DEA.

Agent Driver testified that Agent Williams had explained to him that explusion was the only procedure used to return a fugitive from Panama while he was stationed there. Consistent with this information, Agent Driver testified that subsequent to his arrival in Panama in August 1985, he was told by various

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[5] Exhibit E establishes that Doggett was admitted into the country by U.S. Customs at JFK airport in N.Y.C. on 9/25/82. Agent Driver testified that because of the large number of people entering the United States each day, (Footnote Continued)

embassy personal that there was no provision for the formal extradition of a United States citizen for drug offenses in the treaty between the United States and Panama and that the appropriate procedure was through expulsion. Agent Driver also testified that shortly before he left Panama in February 1987, in his efforts to return fugitive Jack Reed, a defendant in **United States v. Ledher**, 81-82-Cr-J-12, he was told that Reed would be the first fugitive to be extradited pursuant to a recent extradition treaty that had just been signed. However, Agent Driver testified that Panamanians chose not to extradite Reed and had him expelled as previously done in other cases.

(Footnote Continued)
U.S. Customs only randomly runs people through NCIC.

Leonor Doggett Pinzon, the Defendant's mother, testified that no law enforcement officers contacted her regarding the whereabouts of her son subsequent to the initial contact on March 18, 1980. She testified that she did not tell anyone about the arrest warrant. She stated that she did not want to worry her husband so she did not tell him. She testified that she visited her son in jail in Panama but did not tell him about the indictment because she did not want him to worry and wanted him to come back to the United States. She testified that she did not see her son in the United States until somewhere around 1983 - 1984 when he arrived at their home with his wife. She testified that she still did not tell him anything about the indictment

because she thought the statute of limitations had run.

Dolores Doggett, Defendant's wife, testified that she met him in Pittsburgh, Pennsylvania in October 1982. She testified that Doggett was living with his grandmother in Brown Summit, North Carolina. She testified that they moved to Reston, Virginia, and subsequently got married on October 22, 1983. She testified that Marc Doggett interacted openly and freely in the community using his true name. (i.e., they financed through the bank two houses; he obtained his associate degree at college; was a registered voter in 1984 and 1988; had credit cards; filed income taxes since 1983 (exhibit G); was employed; obtained a Virginia driver's license; had obtained three traffic

tickets for moving violations; and had a passport (exhibit Q)).

FACTS SURROUNDING SEARCH AND WHEREABOUTS OF EDWARD ORTIZ-CRISTONCHO

Agent Driver testified that no attempt was made to arrest Ortiz because he had reason to believe that Ortiz was out of the country. Agent Driver testified that in November 1979 he negotiated for 50 kilograms of cocaine with Ortiz and "kingpin Fabio Moreno" in Nassau. Agent Driver testified that after the two of them left he obtained registration information from the hotel they were staying in which revealed Ortiz's full name, street address in Bogota, Colombia, and a passport number which further inquiry revealed it to be a Colombian passport number.

Agent Driver testified that at the time there was no treaty with Colombia allowing extradition and that he could not send anyone to arrest him. Agent Driver testified that in January 1980, he talked with Colombia officials who stated that they had no provision to allow the arrest of Colombian citizens. Agent Driver stated that he was aware that subsequently a treaty for extradition with Colombia was established, but that he did not apply for one. Agent Driver testified that extradition is never granted by the Colombian authorities.

Agent Driver testified that Ortiz was entered into NCIC on May 24, 1980. See exhibit 3. Agent Driver testified that he did not know Ortiz's date of birth and that his attempt to discover it had failed. However, as testified to

by Ralph D. Carr, Inspector Deputy United States Marshal, to be entered into NCIC the date of birth is a prerequisite. Agent Driver testified that since he did not know Ortiz's date of birth, he estimated that Ortiz was the same age as Moreno (6/8/47) and used this date of birth just to get Ortiz into the computer.

Defendant Ortiz testified that he was born in Bogota, Colombia on September 26, 1950. He testified that he traveled to Miami on a passport, applied for a green card in August 1980, and received in on May 20, 1981. Ortiz testified that he originally lived with his inlaws in North Miami Beach, 500 N.W. 179th Street, since February 1980. Ortiz testified that he subsequently remarried and had a daughter born to him on July 16, 1980. See exhibit H. The

record reveals on May 19, 1981, Ortiz requested a search of the Miami Police Department files revealing a misdemeanor arrest. See exhibit I. Ortiz testified that he had filed income taxes with his wife since 1983, which reveal his present address at 5900 S.W. 127th Avenue, Apartment 3405, Miami, Florida. See exhibit N. Ortiz also had a visa card (exhibit K), social security card (since 1980), automobile (exhibit L), Florida drivers license (exhibit O), and received a loan in his name (exhibit M).

Ortiz testified that he has a criminal record. Ortiz testified that he was arrested in Miami, Florida, in May 1983, for possession of a firearm with a silencer and subsequently incarcerated for two months. Ortiz also testified that on September 9, 1987, he was arrested in Miami by the Federal

Bureau of Investigations (FBI) on drug trafficking charges arising out of Los Angeles, California. Ortiz was incarcerated four months in Miami awaiting extradition, and subsequently incarcerated an additional four months in California. Ortiz pled guilty to the charges on August 18, 1987, and subsequently served time.

ARREST OF DOGGETT AND ORTIZ IN SEPTEMBER 1988

Inspector Carr testified that he received an arrest warrant from the Clerk's office regarding the defendants on February 22, 1980. He testified that the U.S. Marshal's Office did not make an active search for Doggett or Ortiz. Inspector Carr testified that the U.S. Marshal's primary responsibilities were escape warrants, material witness

warrants, failure to appear warrants, and parole warrants.

Inspector Carr testified that the U.S. Marshal's Office did not start looking for Doggett or Ortiz until September 1988, when a program called WANT II (warrant apprehension narcotic teams) was implemented on the Gulf coast. The U.S. Marshals service set up in strategic areas from Miami to Texas looking for both state and federal narcotic fugitives.[6]

Inspector Carr testified that he located Doggett by running a credit check which he followed with a driver

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[6] Inspector Carr testified that the U.S. Marshals covering a span from Texas to Miami were assigned approximately 8,000 fugitive cases in WANT II, which resulted in 420 cases being cleared and 225 people being arrested. WANT II ceased approximately five weeks ago.

license check.[7] From these checks he learned where Doggett lived, worked, his wife's name, and the make and tag number of his vehicle. Doggett was subsequently arrested by the U.S. Marshal in Virginia on September 5, 1988.

Inspector Carr testified that he located Ortiz by searching for his criminal history in either NCIC or FCIC

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[7] Inspector Carr testified that the U.S. Marshals service does not use credit checks routinely but rather as a last resort. Similarly, Agent Driver testified that it was not practical to make routine credit checks, and had not proved successful in the past. In addition, Agent Driver testified that he did not make a driver license check on Doggett because he believed he was out of the United States avoiding his arrest and that he does not have the time to make routine checks for driver licenses. Moreover, Agent Driver testified that Jerry Smith from NCIC headquarters in Washington, D.C., discouraged routine checks of driver licenses.

(Florida Crime Information Center)[8] and learned of the arrest in Miami and the subsequent transfer to California. Inspector Carr testified that he contacted the probation officer in California and learned that his probation had been transferred to Miami and was given his Miami address. Ortiz was arrested by U.S. Marshals on September 3, 1988.

DUE PROCESS VS. SPEEDY TRIAL

The protection of the Sixth Amendment is activated by "either a formal indictment or information or else the actual restraints imposed by arrest

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[8] Inspector Carr testified that FCIC has "soundex" which allows the computer to pick up names in a search that have similar spelling and similar birth dates. In contrast with NCIC, if one letter is different in the name or

(Footnote Continued)

and holding to answer a criminal charge...." **United States v. Marion**, 404 U.S. 307, 320-21 (1971); **Dillingham v. United States**, 423 U.S. 64, 65 (1975). However, the United States argues that in a post-indictment case where the Defendant asserts no knowledge of the indictment, the delay issue would more appropriately be argued under a Fifth Amendment due process analysis as could be suggested under **United States v. MacDonald**, 456 U.S. 1 (1982).

> The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by the statutes of limitations. The speedy-trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser but nevertheless substantial, impairment of liberty imposed on an accused while released

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(Footnote Continued)
the birth date is incorrect, the individual will not be retrieved.

> on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

Id. at 8. More support for this argument can be found in **United States v. Loud Hawk**, 474 U.S. 302 (1985), where the Supreme Court stated: "...when defendants are not incarcerated or subjected to other substantial restrictions on their liberty, a court should not weigh the time towards a claim under the Speedy Trial Clause. **Id.** at 312.

This Court has failed to locate any cases where this issue has been directly addressed. Even though prejudice to the defense is not the primary concern of the speedy trial clause, it is not irrelevant. **Barker v. Wingo**, 407 U.S. 514, 532 (1972). In three cases all involving a defendant who asserted no knowledge of the indictment until

arrest, the court applied the **Barker** balancing test in determining whether the delay violated their Sixth Amendment right to a speedy trial. **United States v. Dennard**, 722 F.2d 1510, 1513 (11th Cir. 1984); **United States v. Williams**, 782 F.2d 1462, 1466 (9th Cir. 1986); **United States v. Denson**, 668 F.Supp. 1531, 1534 (S.D. Fl. 1987).

Accordingly, this Court finds that the indictment returned against the Defendants on February 22, 1980, activated the right to a speedy trial. The Court shall now consider under the standard enumerated in **Barker** discussed below whether the delay occasioned in their apprehension violated their Sixth Amendment right to a speedy trial.

RIGHT TO A SPEEDY TRIAL

Under the Sixth Amendment of the United States Constitution, all criminal defendants have a right to a speedy trial. The right to a speedy trial has been described as "amorphous", "slippery", and "generically different" from any other right guaranteed by the Constitution. **Barker**, 407 U.S. at 519, 522. It is almost impossible to say with any precision exactly when a particular defendant's speedy trial right has been violated. **See id.** at 521-22.

Barker v. Wingo, supra, was the Supreme Court's first attempt to develop a criteria to evaluate whether delays in bringing a criminal defendant to trial violate the Sixth Amendment guarantee. In **Barker**, the court enumerated the following four factors which should be

considered in determining whether a criminal defendant has been denied this Sixth Amendment right: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. 407 U.S. at 530. However, no one of these factors is "either a necessary or sufficient condition to the finding of a deprivation of the right," and the courts still must engage in a sensitive balancing process whereby the conduct of both the prosecution and the defendant. are weighed. **Id.** at 530.

(1) Length of the Delay - Doggett and Ortiz

The first **Barker** factor, length of delay, "defines a threshold in the inquiry: there must be a delay long enough to be 'presumptively prejudicial'". **Loud Hawk**, 474 U.S. at

314 (quoting **Barker**, 407 U.S. at 531-32). However, "the length of the delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." **Barker**, 407 U.S. at 530-31. The United States has conceded that the delay of over eight years between the indictment and the arrest of both Defendants was "presumptively prejudicial" and warrants an inquiry into the other three **Barker** factors.

(2)(A) Reason for the Delay - Doggett

Whenever an individual has been officially accused of a crime, the government has "constitutional duty to make a diligent good-faith effort" in attempting to locate and apprehend the accused. **Smith v. Hooey**, 393 U.S. 374, 383 (1969); **United States v. Blanco**, No. 85-1423, slip op. at -- (2d Cir.

November 10, 1988); **United States v. Diacolios**, 837 F.2d 79, 82 (2d Cir. 1988); **United States v. Bagga**, 782 F.2d 1541, 1543 (11th Cir. 1986). Doggett asserts that there are basically four time periods during which the government failed to make a "diligent good-faith effort" to locate and apprehend him. Doggett has listed these time periods as: (1) the time period between the return of the indictment of February 22, 1980, and his departure to Colombia on March 14, 1980; (2) the time period during his incarceration in Panama; (3) his lawful entry into the United States on September 25, 1982; and (4) the following time period up until his arrest which he lived openly under his true name.

(2)(A)(1) February 22, 1980 - March 18, 1980

Doggett argues that there was almost a one month period after the indictment was returned that his arrest could have been executed at his parents residence before he left Colombia. Doggett alleges that no rational answer has been suggested to support such a delay. However, the record is contrary to Doggett's assertion. The indictment returned listed multiple defendants. Agent Driver testified the defendants were located in different geographical areas and that he wanted to arrest them simultaneously. He also testified that many of the major defendants were located outside of the United States and attempts were being made to lure them into the United States. Clearly, the government may justifiably delay

arresting Doggett one month when the arrest may cause co-defendants to flee. **United States v. Blanco, supra.** Moreover, Agent Driver testified that Doggett was residing in North Carolina and that it takes time to contact the out of state law enforcement officials and coordinate the arrest.

Accordingly, the court cannot find that the government was either negligent or failed to exercise due diligence in attempting to arrest Doggett on March 18, 1980, pursuant to the indictment returned on February 22, 1980.

(2)(A)(2) Incarceration in Panama, ? - July 25, 1982[9]

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[9] No evidence has been submitted establishing the date Doggett was taken into Panamanian custody. However, DEA learned of Doggett's incarceration in Panama on September 21, 1981.

Secondly, Doggett contends that the government did not exercise due diligence by failing to extradite him pursuant to the treaty with Panama. Doggett argues under the authority of **Bagga, supra**, that his "absence from the country did not relieve the government of its obligations to make good-faith efforts to have him returned." 782 F.2d at 1543. Agent Driver testified that he was unaware that United States fugitives with narcotic charges could be formally extradited pursuant to the treaty with Panama. Agent Driver testified that Agent Williams who was in charge of the DEA office in Panama up until July 1982, told him that expulsion was the procedure used and had worked in the past. Agent Driver also testified that Agent Williams made a written request for the expulsion of Doggett.

Accordingly, the Court finds that expulsion procedures were in fact initiated and sufficed as a "good faith effort" to have Doggett returned to the United States to face the pending charges.

(2)(A)(3) & (4) July 25, 1982 - September 5, 1988

Finally, Doggett alleges that the facts surrounding the government's failure to arrest him upon his reentry into the United States and the government's subsequent failure to arrest him while he was living openly in the United States clearly illustrates the lack of diligence in their efforts to apprehend him. The testimony indicates that the government's failure to apprehend Doggett immediately upon his release from Panamanian custody on July 15, 1982, was the result of a

breakdown in communication between government agencies. The Panamanian authorities had been notified and concurred in the request for the expulsion of Doggett. Doggett was released the same month Agent Williams left Panama who requested the expulsion. There presently is no indication that Agent Williams received any notice of Doggett's release. However, the record does reflect that the State Department in Panama received notice of Doggett's release. The court can only speculate that the information was transmitted to the DEA office in Panama and was lost somewhere in the change of command or never made it there for some unknown

reason.[10] Obviously, the failure to apprehend Doggett upon his release from Panamanian custody could be attributed to nothing more than "bureaucratic negligence". See **United States v. Greene**, 578 F.2d 648, 655 (5th Cir.

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[10] The Court does not have sufficient facts to establish whether or not the DEA's failure to discover Doggett's release was the direct result of the State Department or its own negligence. This raises an interesting question as to whether or not the negligence of another agency can be attributed to the law enforcement agency seeking the apprehension of the fugitive. Valid arguments could be made for each side. It could be argued that although the delay did not emanate from direct action by the law enforcement officers, it should be nonetheless chargeable to the government because it results from a breakdown in the system that inevitably results in delay. On the other hand, it could be argued that errors made by helping agencies should not be chargeable if there was a reasonable good faith belief the helping agency was conducting a proper investigation. Otherwise, the agency responsible for the search would be held accountable to conduct every conceivable type of nationwide hunt.

1978), **cert. denied**, 439 U.S. 1133 (1979); **United States v. Palmer**, 537 F.2d 1287, 1288 (5th Cir. 1976), **cert. denied**, 434 U.S. 1018 (1978) (bureaucratic negligence is a neutral reason and should be weighed less heavily than deliberate delay).

Doggett was not arrested by customs upon his reentry into the United States because he was taken off the text computer on May 2, 1980. Agent Driver testified that he was unaware that Doggett had been removed from the text computer and only guessed that procedurally customs removes names after a certain number of days. Doggett also was not picked up on NCIC because customs only randomly makes checks because of the large number of people that daily come through customs.

Agent Driver testified that he did not make a search for Doggett in the United States subsequent to his release from Panamanian custody because he just assumed that Doggett went back to Colombia to avoid charges that were pending in the United States. This assumption is not irrational taking into consideration that Agent Driver was aware that Doggett's mother had been informed of her son's charges pending in the United States and that Agent Driver was cognizant that Doggett was residing in Colombia prior to his arrest by Panamanian authorities. Moreover, it would not be unreasonable for Agent Driver to assume that Doggett would be arrested by U.S. Customs if he attempted to reenter the United States because he testified that he was not aware that

Doggett had been removed from the "text" (customs) computer.

In **Barker**, the Court distinguished between a deliberate attempt to delay the trial in order to hamper the defense, which would be weighed heavily against the government, and a "more neutral reason" such as negligence or overcrowded courts which would be weighed less heavily against the government. 407 U.S. at 531. In **Bagga**, the court elaborated stated that "a more neutral reason, such as negligence, does not necessarily tip the scale in favor of the defendant, particularly where the defendant was at liberty and outside the jurisdiction where the indictment was returned." 782 F.2d at 1544 (quoting **United States v. Walters**, 591 F.2d 1195, 1201 (5th Cir.), **reh'g. denied**, 549 F.2d 863 **cert. denied**, 442 U.S. 945 (1979)

and citing **United States v. Carter**, 603 F.2d 1204, 1207 (5th Cir. 1979)). See also **Dennard**, 722 F.2d at 1513; **United States v. Saintil**, 705 F.2d 415, 418 (11th Cir.), **cert. denied**, 464 U.S. 855 (1983); **United States v. Greer**, 655 F.2d 51, 53 (5th Cir. 1981; **United States v. Avalos**, 541 F.2d 1100, 1113 (5th Cir. 1976).

In conclusion, the delay between Doggett's release from Panamanian custody on July 15, 1982, and his subsequent arrest on September 5, 1987, clearly is attributable to the negligence of the government. However, Doggett does not make any allegation that the government's failure to apprehend him was purposeful or done to obtain a "tactical advantage", a practice clearly condemned by the Supreme Court which could warrant the

severe remedy of dismissal. See **Barker**, 407 U.S. at 531. Although the court does not condone DEA's failure to apprehend Doggett at an earlier date, it recognizes the problems caused by large case loads, the reality of making practical decisions regarding efforts to implement available search techniques in each case assigned to the agent, and the added problem that Doggett left the boundaries of the United States for over two years. The Court would hope for perfection, but recognizes fallibility.

Accordingly, while the ultimate responsibility for delay subsequent to July 25, 1982, must rest with the government and not the Defendant, because the delay was the result of negligence and was not intentionally done for tactical reasons, the Court must weigh the reason against the

government although less heavily than were it to have been deliberate. **Barker**, 407 U.S. at 531 (negligence a "neutral" reason).

(3)(A) Defendant's Assertion of his Right to Speedy Trial - Doggett

The third **Barker** factor to be considered is the defendant's assertion of his right to a speedy trial. In **Barker** the Supreme Court rejected any kind of a rigid demand-waiver rule whereby a defendant's failure to demand a trial would constitute a **de facto** waiver of the speedy trial right. **Id.** at 524-28. The Supreme Court reasoned that waiver is defined as "an intentional relinquishment or abandonment of a known right or privilege." **Id.** at 525. Under the demand-waiver doctrine a fundamental right is lost through a silent record.

Nevertheless, the Supreme Court recognized that although failure to assert the right does not act as a waiver, such failure will make it difficult for a defendant to assert his right successfully at some later point in time. **Id.** at 531-32. The Supreme Court stated that such assertions from defendants are "entitled to strong evidentiary weight" in determining whether their rights to a speedy trial have been denied. **Id.** at 531-32. "The more serious the deprivation the more likely a defendant is to complain." **Id.** at 531.

There is no evidence suggesting that Doggett even knew that drug trafficking charges were pending in the United States against him until he was arrested September 5, 1988. Doggett's mother testified that she never told him

or anyone else about the charges and Doggett's wife testified that she was not aware of the charges. Doggett failed to take the stand and testify. While clearly the Defendant's assertion of his right is an important factor in determining whether his speedy trial right was violated, Doggett had no reason to do so if we assume he was unaware of the pending charges.

Accordingly, Doggett's failure to assert his right to a speedy trial shall not be weighed against him. See **Dennard**, 722 F.2d at 1513 (court held that the defendant's failure to assert her speedy trial rights did "not inure to [her] benefit" when she was unaware of the indictment until arrest); **Williams**, 782 F.2d at 1466 (defendant's failure to assert his right to a speedy trial not weighed against defendant when

he was unaware of the indictment). However, the Court notes Doggett's failure to assert his right to a speedy trial until after his arrest reveals that little personal discomfort was occasioned by the delay.

(4)(A) Prejudice to the Defendant - Doggett

The fourth and final **Barker** factor to be considered is whether the defendant has suffered any prejudice resulting from the delay. This fourth factor must be assessed in light of the certain interests which the speedy trial right was designed to protect. The Supreme Court has identified the following three interests: (1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation, and (3)

to limit the possibility that long delay will impair the ability of an accused to defend himself. **United States v. Ewell**, 383 U.S. 116, 120 (1965); **Barker**, 407 U.S. at 532. The Supreme Court has referred to the third interest, prejudice to the defense, as the most serious one because the inability of a defendant to adequately prepare his case shows the unfairness of the entire system upon which he is prosecuted.[11] **Barker**, 407 U.S. at 532.

Although establishing prejudice is not a prerequisite to finding a Sixth Amendment violation, **see Moore v. Arizona**, 414 U.S. 25, 26 (1973), the Eleventh Circuit has been reluctant to

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[11] Subsequent cases have given the third interest less importance in the consideration of the defendant's speedy trial right. **McDonald**, 456 U.S. at 8; **Loud Hawk**, 474 U.S. at 312.

find a speedy trial violation in the absence of genuine prejudice. **Ringstaff v. Howard**, No. 87-7573, slip op. at 542 (11th Cir. Dec. 8, 1988); **United States v. Mitchell**, 769 F.2d 1544, 1547 (11th Cir. 1985), **cert. denied**, 474 U.S. at 1066 (1986); **Dennard**, 722 F.2d at 1513-14; **Avalos**, 541 F.2d at 116-17; (unless the other three **Barker** factors all weigh heavily against the government, defendants must demonstrate actual prejudice). See also **United States v. Martinez**, 776 F.2d 1481, 1483 (10th Cir. 1985) **United States v. Jenkins**, 701 F.2d 850, 857-58 (10th Cir. 1983).

Since the second and third factor of the **Barker** test do not **weigh heavily** against the government, Doggett must establish "actual prejudice". The record clearly indicates that the

Defendant did not suffer any prejudice under the first two interests sought to be protected under the speedy trial right. Doggett was never subjected to pretrial incarceration due to this indictment. Furthermore, Doggett's liberty was not restricted by the indictment nor could he claim to have suffered any anxiety over the more than eight year wait for his arrest pursuant to the indictment since he contends he lived openly and freely within the United States and testimony indicates that he was not aware of its existence.

Under the third interest, Doggett alleges the more than eight year delay has prejudiced his defense by faded memories; lost tape recorded telephone conversations which may have been exculpatory; a missing confidential

informant; and his loss of eligibility for youthful offender status.

The first three allegations are conclusory and unpersuasive to make out a speedy trial violation. The mere possibility of absence or loss of memory of witnesses have been consistently held insufficient.[12] **See Loud Hawk**, 474 U.S. at 315; **Blanco**, **supra**, slip op. at --; **Dennard**, 722 F.2d at 1513-14; **United States v. Greene** 578 F.2d at 648; 656 (5th Cir. 1978), **cert. denied**, 439 U.S.

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12 The potential missing witness is a confidential informant for the DEA now known to be Ivan Cifuentes. Whether Cifuentes will be available for trial is speculative at this point in time. Agent Driver testified that the last time he spoke with Cifuentes was in the summer of 1988 in California. Cifuentes has withdrawn from the witness protection program and efforts to contact him since September 1988 have proven unsuccessful. Agent Driver stated that Cifuentes periodically maintains contact and he believed that they could find him.

1133 (1979); **United States v. Edwards**, 577 F.2d 883, 889 (5th Cir.), **cert. denied**, 439 U.S. at 968 (1978); **Avalos**, 541 F.2d at 1116. The unsubstantiated assertion that the missing tapes "may be exculpatory" equally requires the Court to speculate and is insufficient. **See United States v. Golden**, 436 F.2d 941 (6th Cir.) (claimed impairment of defense because of delay must be specific and not be mere conjecture), **cert. denied**, 404 U.S. 910 (1971). Faded memories, missing witnesses, and lost tape recordings is a "two way sword" because it is very likely that it may disadvantage the government far more than the accused because the government carries the burden of proof. **See Loud Hawk**, 474 U.S. at 315.

Doggett's fourth assertion that he suffered prejudice by the delay since he

is no longer eligible for the Youth Correction Act, which Congress abolished in 1984, is also invalid. Doggett would only have been eligible for the Young Adult Offender Act, 18 U.S.C. §4216, which applied only to those who had not obtained their 25th birthday by the time of their conviction. Since Doggett was born June 11, 1956, his eligibility for the Act ended June 10, 1982, prior to his September 25, 1982, return to the United States. Since the delay was due to Doggett's absence from the country and was not the fault of the government, the asserted prejudice is not present.

Accordingly, neither the specific types of prejudice mentioned in **Barker** nor any others have been established by Doggett. The passage of time alone, without a significant deprivation of liberty or impairment of the ability to

defend, is not conclusive evidence of prejudice. The Court holds that no prejudice can be found in the record.

(5)(A) Conclusion - Doggett

Doggett has failed to establish any demonstrable prejudice that he has suffered from the delay in his apprehension. He has not suffered any pretrial incarceration due to this indictment nor has his liberty been restricted by the indictment. Doggett is precluded from arguing that he experienced any anxiety as a result of the charges since he argues he was not aware of the indictment until the arrest. The government made a diligent good faith effort to locate Doggett however it was spoiled through its own negligence. The government's failure to locate Doggett was not part of any scheme to prejudice his defenses and

thus is weighted less heavily against them.

Accordingly, after careful consideration of all the factors outlined in **Barker**, this Court concludes that Doggett's right to a speedy trial has not been violated under the circumstances.

(2)(B) Reason for the Delay - Ortiz

Ortiz contends that the reason for the delay was caused by the government's failure to make a diligent search for his apprehension. Ortiz asserts that if any effort would have been made, he would have been found as illustrated by the U.S. Marshal's efforts who apprehended him within 48 hours of being given the task. Ortiz contends that the government's NCIC entry by itself was insufficient to constitute a diligent search.

However, the entry of Ortiz into NCIC by Agent Driver under the circumstances without hindsight constituted a diligent good faith effort to apprehend Ortiz. Agent Driver's investigation had revealed Ortiz's full name, an address in Bogota, Colombia, and a Colombian passport number. Agent Driver testified that he had visited Colombia in January 1980, and talked with Colombian officials about Ortiz, but could not obtain any further information about him. Agent Driver did not make further efforts to search for Ortiz in the United States under the reasonable belief that he was not living within the United States. As testified to by Agent Driver, it is not practical to make routine driver license checks or credit checks, especially when you believe they are not living within the

country. A "diligent good-faith effort" does not require the government to exhaust all conceivable avenues. **Bagga**, 782 F.2d at 1541.

The Court notes that Ortiz's entry into NCIC did not prove productive simply because the system requires exact spellings of name and the exact birth date. Agent Driver attempted to obtain Ortiz's birth date to no avail and substituted it with Fabio Moreno's just so he could get him entered into the system. Thus, Ortiz was not picked up on NCIC when he was arrested in 1983 and 1987 because the computer did not have his correct birth date.

Accordingly, the Court concludes that Agent Driver's efforts to gain information regarding Colombian authorities regarding Ortiz and the entry of Ortiz into NCIC was sufficient

to constitute under the circumstances a diligent good faith effort to apprehend Ortiz. The reason for delay shall not be weighted against the government.

(3)(B) Defendant's Assertion of his Right to Speedy Trial - Ortiz

There is no evidence suggesting Ortiz was aware of the outstanding drug trafficking charges, but equally so there was no evidence introduced that he was not aware of the charges. Ortiz failed to testify one way or the other. As already stated, such assertions from defendants are "entitled to strong evidentiary weight" in determining whether their rights to a speedy trial have been denied. **Barker**, 407 U.S. at 531-32. "The more serious the deprivation the more likely a defendant is to complain." **Id.** at 531.

Accordingly, Ortiz' failure to request a speedy trial during the more than eight years of the outstanding indictment does not inure to his benefit.

(4)(B) Prejudice to the Defendant - Ortiz

As already stated, when the first three **Barker** factors weigh heavily against the government, the defendant need not demonstrate actual prejudice. **Ringstaff, supra; Dennard, supra.** A careful review of the equities involved clearly reveals that Ortiz has failed to demonstrate that the second and third **Barker** factors **weigh heavily** against the government. Therefore, Ortiz is required to establish actual prejudice resulting from the delay.

Ortiz has failed to demonstrate that he suffered any prejudice as the

result of the delay by the government in making his apprehension. Ortiz was not subjected to pretrial incarceration due to this indictment and his assertion that he has lived openly and freely over the past eight years clearly establishes that neither his liberty has been abridged by the outstanding indictment nor has he suffered any anxiety.

Ortiz has also made conclusory assertions that the delay will prejudice his defense. Ortiz contends that it is now impossible for him to prepare an alibi defense to the charges and that the missing tapes may be exculpatory. However, the legitimacy of Ortiz's alibi is very questionable. Ortiz has failed to provide the Court with a scintilla of evidence about the alibi, such as the names of the missing witnesses that he asserts could corroborate his alibi as

asserted in his Motion, or exactly what the alibi is. Also, the Court has already rejected the similar unsubstantiated assertion by Doggett that the missing tapes "may be exculpatory". The courts have consistently held that defendants are required to articulate with more specificity allegations of prejudice when trying to establish a violation of their speedy trial right. See Loud Hawk, supra; Blanco, supra; Dennard, supra; Avalos, supra.

The Court also does not find any merit in Ortiz's assertion that if he would have been arrested in a timely fashion he would have gone to trial without a criminal record. Although Ortiz may now be disadvantaged at trial by his criminal record, the Court cannot find that Ortiz's post indictment

criminal activity should be attributed against the government and used to Ortiz's advantage to claim prejudice and a violation of his speedy trial rights.

In sum, Ortiz has failed to demonstrate any prejudice as a result of the delay in his apprehension.

(5)(A) Conclusion - Ortiz

Under the circumstances, the Court finds that the government made a diligent good faith effort to apprehend Ortiz. The record is entirely void as to whether Ortiz knew about the indictment prior to his arrest. Ortiz's failure to assert his right to a speedy trial does not benefit him in the balancing. Ortiz has failed to demonstrate any prejudice as result of the delay by the federal government in obtaining his apprehension. Ortiz was not subjected to pretrial incarceration,

nor was there any showing that Ortiz suffered from any anxiety.

Accordingly, the Court rejects Ortiz's claim that his right to a speedy trial has been violated.

III. RECOMMENDATION[13]

The Motions to Dismiss be DENIED.

DONE AND ENTERED at Jacksonville, Florida, this 27th day of December, 1988.

/s/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
United States Magistrate

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13 Any party may file and serve objections hereto within ten (10) days after service of this opinion. Failure to do so shall bar the party from a de novo determination by a district judge of an issue covered herein and from attacking factual findings on appeal. See 28 U.S.C. §636; **Thomas v. Arn**, 106 S.Ct. 466 (1986); **Nettles v. Wainwright**, 677 F.2d 404 (en banc) (5th Cir. Unit B, 1982); and Local Rule 6.02.

Copies to:

The Honorable John H. Moore, II
United States District Judge

United States Attorney (Morris)

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v. Case No. 80-11-Cr-J-16

LUIS EDWARDO ORTIZ-CRISTONCHO
MARC GILBERT DOGGETT

ORDER

The above-styled cause is before the Court on the Report and Recommendation of the United States Magistrate, filed herein on December 27, 1988. Defendant, MARC GILBERT DOGGETT, filed objections to the Report and Recommendation on January 6, 1989, and the Government filed its response thereto on January 17, 1989. Defendant, LUIS EDWARDO ORTIZ-CRISTONCHO, did not file any objections to the Report and Recommendation.

After conducting a de novo review of the entire record herein, the Court

hereby adopts, confirms and ratifies the Report and Recommendation. Accordingly, it is now

ORDERED AND ADJUDGED:

That the defendants' motions to dismiss the indictment for violation of the sixth amendment right to a speedy trial are hereby DENIED.

DONE AND ORDERED in Chambers in Jacksonville, Florida, this 31 day of January, 1989.

/s/ John H. Moore
UNITED STATES DISTRICT JUDGE

Copies to:

U.S. Attorney (Morris)
William Sheppard, Esq.
Stephen A. Glass, Esq.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 89-3298

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Marc Gilbert DOGGETT,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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July 19, 1990

Before KRAVITCH and CLARK, Circuit Judges, and ATKINS*, Senior District Judge.

KRAVTICH, Circuit Judge:

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Marc Doggett appeals his conviction on one count of conspiracy to import cocaine entered pursuant to a conditional plea agreement. Doggett contends that the eight and a half year delay between his indictment and arrest violated his sixth amendment right to a speedy trial.[1] The district court adopted the recommendation of a magistrate that found no violation. We affirm.

STATEMENT OF FACTS

Marc Doggett was indicted on February 22, 1980, for conspiring to import cocaine in violation of 21 U.S.C. §963 and conspiracy to distribute

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[1] The Speedy Trial Clause of the Sixth Amendment states: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...."

cocaine in violation of 21 U.S.C. §846. A warrant for Doggett's arrest was issued the same day. In order to make simultaneous arrests of several individuals involved in the conspiracy, Douglas Driver, the Drug Enforcement Administration (DEA) agent who conducted the investigation of Doggett notified the United States Marshal's Service that the DEA would coordinate Doggett's arrest. It is uncontested that Doggett did not know as this or any other time prior to his arrest in 1988 that he had been indicted or that a warrant for his arrest had issued.

On March 18, 1980, agent Driver instructed two law enforcement officers to arrest Doggett at his parents' home. Doggett's mother informed them that her son had left for Bogota, Colombia four days earlier. Driver entered a notation

in the Treasury Enforcement Communication System (TECS),[2] alerting all U.S. Customs stations that Doggett was wanted pursuant to an arrest warrant. Driver also sent a teletype to all of the United States Customs stations, the El Paso Intelligence Center (EPIC),[3] and INTERPOL stating that Doggett was wanted by the DEA pursuant to an arrest warrant issued in Florida. The teletype provided a description of Doggett, the name of his travelling companion, Doggett's flight information relating to his trip to

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[2] TECS is the computer system used by customs agents to screen individuals entering the United States at Airports and border crossings.

[3] EPIC coordinates intelligence gathering operations for various federal law enforcement agencies, including the Marshals Service, DEA, and the Customs Service.

Colombia, and agent Driver's contact number. Driver did not place Doggett on the National Crime Information Center (NCIC)[4] computer system because he erroneously believed that the TECS notation and EPIC teletype would suffice to enter Doggett onto the system. Driver's TECS notation, unbeknownst to him, expired in September 1980 and was deleted from the system. On March 18, 1981, Driver realized that Doggett had not been placed on th NCIC computer and completed a fugitive declaration form which accomplished that purpose.

On September 21, 1981, Driver was informed by agent Williams, the official in charge of DEA operations in Panama, that Doggett had been arrested on drug

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[4] The NCIC system alerts police if someone they have arrested is wanted in another jurisdiction.

charges by the Panamanian authorities. Driver requested Williams to initiate information expulsion proceedings, but made no attempts to extradite Doggett formally. Driver testified that he did not try to initiate extradition proceedings because he was told by law enforcement officials in the United States Embassy in Panama that the extradition treaty between the United States and Panama did not cover drug offenses. Additionally, Driver testified that explusion proceedings had succeeded both before and after their attempted use on Doggett in expelling wanted individuals to the United States. On October 15, 1981, Williams received a letter for the attorney general of Panama agreeing to expel Doggett to the United States once the Panamanian prosecution was completed. Williams

left Panama in July 1982 and reported to Driver that Doggett was still in Panamanian custody.

On July 15, 1982, however, Doggett was released by Panamanian authorities. Several cables from the United States embassy in Panama to the Department of State in Washington, D.C., indicate that the United States was notified both of Doggett's release and of his plans to return to Colombia. Doggett proceeded to Colombia where he lived with his aunt for nearly three months. On September 25, 1982, Doggett returned to the United States and was admitted by United States Customs at John F. Kennedy Airport in New York City.

From 1982 to 1985 Agent Driver continued to believe that Doggett was being held by the Panamanian authorities. During this period, Driver

filed three DEA-6 status forms stating that Doggett was in custody in Panama and that a request for explusion had been made. Driver testified that it was his understanding that American citizens serving time in Panamanian prisons for drug offenses usually were not released for five or ten years. Therefore, he assumed that Doggett had received a lengthy sentence from the Panamanians, and did not communicate with Williams's successor concerning Doggett's status. Driver did not discover that Doggett had already been released until he was transferred to Panama in August 1985.

Nevertheless, Driver made no specific effort to locate Doggett after 1985 because he believed that the defendant was living in Colombia. Driver knew that Doggett had been living in Colombia before he came to Panama and

had obtained documents from Panamanian law enforcement officials indicating that Doggett had an address in Bogota, Colombia, and that he was using his mother's maiden name as an alias. Driver testified that he did not attempt a fifty state driver's license or credit search because he did not believe the defendant was in the United States, the defendant had a history of using other names, and such investigative techniques were nearly always unsuccessful.

In September 1988, pursuant to WANT II,[5] a Marshals' office program that checks all outstanding warrants to see if they have been served, a credit check was made on Doggett. Within thirty

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[5] WANT II was a special narcotic fugitive apprehension program targeting roughly 8,000 individuals with outstanding warrants. The program resulted in 225 arrests out of 8,000 cases.

minutes the government discovered Doggett's driver's license number, the make and tag of his car, his wife's name, his employer and his address. Doggett was arrested on September 5, and arraigned on September 20, 1988.

It is undisputed that from the time Doggett returned to the United States to the present, he has led a normal, productive, and law-abiding life. He met his wife in October 1982 and married a year later. Doggett interacted openly and freely in the community using his real name and making no attempt to conceal his identity or whereabouts. He financed two houses, through the bank, possessed credit cards, was a registered voter, filed income tax returns, obtained a driver's license, was issued three traffic tickets, obtained his associate degree at college, and was

employed as a computer operations manager.

DISCUSSION

The facts in this case are essentially undisputed. The point of contention is the magistrate's application of the Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), sixth amendment speedy trial analysis to the facts.[6] The trial court's legal conclusion that Doggett

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6 We initially note our agreement with the magistrate's determination that the indictment returned against Doggett on February 22, 1980, activated his sixth amendment right to a speedy trial even though he had no knowledge of the indictment until he was arrested. This result is compelled by the Supreme Court's holding that "it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the (Footnote Continued)

failed to establish a violation of his constitutional right to a speedy trial is reviewable de novo. The factual findings underpinning this legal conclusion are reviewed for clear error. Mitchell, 769 F.2d at 1547; see United States v. Bagga, 782 F.2d 1541, 1544-45 (11th Cir. 1986).

In Barker, the Court enumerated four factors that should be considered in assessing the assertion of a speedy trial violation. These factors are

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(Footnote Continued)
Sixth Amendment." Dillingham v. United States, 423 U.S. 64, 65, 96 S.Ct. 303, 303, 46 L.Ed.2d 205 (1975); United States v. Marion, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971); see United States v. Loud Hawk, 474 U.S. 302, 310-12, 106 S.Ct. 648, 653-54, 88 L.Ed.2d 640 (1986); see, e.g., United States v. Mitchell, 769 F.2d 1544, 1546-47 (11th Cir. 1985), cert. denied, 474 U.S. 1066, 106 S.Ct. 819, 88 L.Ed.2d 792 (1986) (calculating delay for speedy trial purposes from time indictment returned even though defendant did not know of indictment).

(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. Barker, 407 U.S. at 530-32, 92 S.Ct. at 2192-93; see Loud Hawk, 474 U.S. at 313-14, 106 S.Ct. at 655; Ringstaff v. Howard, 885 F.2d 1542, 1543 (11th Cir. 1989) (en banc). These factors must be carefully balanced because none of them is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." Barker, 407 U.S. at 533, 92 S.Ct. at 2193, Mitchell, 769 F.2d at 1546; United States v. Dennard, 722 F.2d 1510, 1512 (11th Cir. 1984).

The Eleventh Circuit, en banc, recently revisited the speedy trial issue in Ringstaff v. Howard, 885 F.2d 1542 (11th Cir. 1989). The court

interpreted Barker as requiring the length of the delay to be "presumptively prejudicial" in order to trigger an inquiry into the other three factors. Id. at 1543; see Loud Hawk, 474 U.S. at 314, 106 S.Ct. at 655. The court noted that absent bad faith or a deliberate effort to hamper the defense, a defendant is required to show actual prejudice in order to prevail. Ringstaff, 885 F.2d at 1545. The defendant need not show actual prejudice, however, if the other three factors weigh heavily against the prosecution. Id. at 1543.

The government concedes that the eight and a half year delay is presumptively prejudicial, warranting an inquiry into the other three factors. The magistrate found that the other three factors did not weigh against the

government sufficiently to dispense with the requirement of actual prejudice. The magistrate subsequently found that the defendant had failed to show actual prejudice and therefore concluded that his right to a speedy trial had not been violated. The district court adopted the magistrate's recommendation. the following analysis will address each of the Barker factors seriatim.

Length of Delay

This factor clearly weighs heavily in favor of the defendant. In Barker, the Supreme Court described a five year delay as "extraordinary." 407 U.S. at 533, 92 S.Ct. at 2193-94. Likewise, in Ringstaff, the Eleventh Circuit found a twenty-three month delay to be presumptively prejudicial. 885 F.2d at 1543; cf. Bagga, 782 F.2d at 1542

(thirty-six month delay presumptively prejudicial); Dennard, 722 F.2d at 1513 (fifteen month delay presumptively prejudicial). The government has conceded that the length of the delay is presumptively prejudicial.

Reason for the Delay

Once an individual has been indicted, the government has a constitutional duty to make a diligent good-faith effort to locate, apprehend, and bring to trial the accused. Bagga, 782 F.2d at 1543; see Smith v. Hooey, 393 U.S. 374, 383, 89 S.Ct. 575, 579, 21 L.Ed.2d 607 (1969). This duty persists even when the accused is out of the country. Bagga, 782 F.2d at 1543. Thus, when the government acts negligently in seeking and apprehending the accused, the reason for the delay

should be weighed against the government. Barker, 407 U.S. at 531, 92 S.Ct. at 2192; Dennard, 722 F.2d at 1513; see Bagga, 782 F.2d at 1544; United States v. Carter, 603 F.2d 1204, 1207 (5th Cir. 1979);[7] United States v. Greene, 578 F.2d 648, 655 (5th Cir. 1978); cert. denied, 439 U.S. 1133, 99 S.Ct. 1056, 59 L.Ed.2d 96 (1979), United States v. Palmer, 537 F.2d 1287, 1288 (5th Cir. 1976), cert. denied, 434 U.S. 1018, 98 S.Ct. 738, 54 L.Ed.2d 764 (1978).

In order for this factor to be weighed heavily against the government, however, the trial delay must result from bad faith or a dilatory purpose

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[7] The Eleventh Circuit, in the en banc decision Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent
(Footnote Continued)

by the government. Ringstaff, 885 F.2d at 1544; see Loud Hawk, 474 U.S. at 315-16 , 106 S.Ct. at 656; Barker, 407 U.S. at 531, 92 S.Ct. at 2192; Carter, 603 F.2d at 1207; Palmer, 537 F.2d at 1288. Bad faith encompasses a deliberate effort to prejudice or harass the defendant, while a dilatory purpose will include efforts made by the government to gain a tactical advantage over the accused. See Loud Hawk, 474 U.S. at 315, 106 S.Ct. at 656; Barker, 407 U.S. at 531, 92 S.Ct. at 2192; Marion, 404 U.S. at 325, 92 S.Ct. at 466; Ringstaff, 885 F.2d at 1544; Bagga, 782 F.2d at 1544.

The court below appropriately weighed this factor against the government rather than the defendant,

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(Footnote Continued)
decisions of the former Fifth Circuit rendered prior to October 1, 1981.

because the delay in arresting Doggett is better attributed to the government's negligent law enforcement efforts than the conduct of the defendant. Agent Driver erred in allowing the TECS notation to lapse in September 1980 and in failing to place Doggett on the NCIC computer system until March 1981.[8] Additionally, the government, through

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[8] It bears noting that neither of these errors was particularly significant in contributing to the delay in arresting the defendant. Agent Driver entered the TECS notation immediately after the agents failed to arrest Doggett at his parent's home. Although this notation expired while Doggett was incarcerated in Panama, the NCIC entry was in place when Doggett reentered the country in September 1982. This notation would have alerted customs officials at JFK airport that there was an outstanding warrant for the defendant's arrest. The customs officers at JFK, however, are only able to conduct random NCIC checks due to the
(Footnote Continued)

the negligence of either the DEA or the State Department, erred in failing to notify the appropriate law enforcement personnel that Doggett was returning to the United States.[9] As a result, Doggett was not apprehended upon entering the United States and agent

(Footnote Continued)
great number of individuals entering the country. The failure of these officials to conduct a check of Doggett is unfortunate, but not negligent. See United States v. Deleon, 710 F.2d 1218, 1221 (7th Cir. 1983).

[9] Doggett's suggestion that the government acted negligently in failing to extradite him while he was incarcerated in Panama is without merit. The DEA acted within its discretion in determining that informal expulsion proceedings would be a more effective means of bringing Doggett to trial in the United States than formal extradition. The magistrate received ample evidence that the expulsion process had succeeded previously and that extradition, in practice, was an impracticable means of seeking the release of wanted individuals from Panamanian jails. The failure of the Panamanian authorities to expel Doggett
(Footnote Continued)

Driver did not know that Doggett had been released from the Panamanian prison until August 1985. Finally, agent Driver acted negligently in failing to pursue Doggett in the United States because he erroneously assumed that Doggett was living in Colombia. Driver did not attempt to verify that Doggett was in Colombia and did not make any effort to locate Doggett in the United States in the event that his assumption concerning Doggett's whereabouts was incorrect. In fact, had Driver periodically sought verification from the State Department that Doggett was still being held by the Panamanian authorities, he would have realized that Doggett had left the country well before August 1985.

(Footnote Continued)
after they had agreed to do so, cannot be imputed to the United States.

Because the government's efforts to apprehend Doggett were negligent and there is no persuasive evidence that Doggett purposefully tried to evade capture, the reason for delay must be weighed against the government. There is no contention here that the government deliberately delayed apprehending Doggett.[10] Doggett does not allege that the government purposefully sought to prejudice, harass, or gain any other advantage over

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[10] Doggett does argue that the twenty-six day gap between his indictment and the first attempt to arrest him constitutes a deliberate breach of the government's duty to make a diligent, good faith effort to bring an accused to trial. Although the delay was deliberate, its length was insufficient to implicate speedy trial concerns and it was not motivated by a desire to gain an advantage over the accused. The court below did not clearly err in finding that the delay was necessary to facilitate the arrest
(Footnote Continued)

him by delaying the arrest. Indeed, there is no reason to believe that the government would not have immediately seized the opportunity to arrest Doggett had they succeeded in locating him sooner. Although a showing of deliberate delay is not necessary for an individual to establish a constitutional speedy trial violation if he demonstrates actual prejudice, it is a necessary prerequisite to weighing the reason for the delay heavily against the government.

Defendant's Assertion of Right

The magistrate determined that Doggett's failure to assert his right to a speedy trial soon after his indictment should not be weighed against him

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(Footnote Continued)
of Doggett's codefendants and to coordinate the out-of-state arrest.

because he was unaware of the pending charges. Doggett contends that his assertion of the right as soon as he became aware of the charges, following his 1988 arrest, requires this factor to be weighed heavily against the government. The magistrate's position is correct and supported by the precedent of this circuit.

In United States v. Mitchell, the defendants failed to assert their speedy trial right before their arrest because a sealed indictment prevented them from knowing of the impending charges. 769 F.2d at 1546. The Eleventh Circuit, applying the Baker analysis, affirmed the district court's refusal to weigh the defendants' assertion of the right after arrest in their benefit. Id. at 1547. Likewise, in United States v. Dennard, this court refused to weigh the

assertion of the right factor against the government when the defendant did not know of the indictment until after her arrest. 722 F.2d at 1513.

These results are consistent with the Supreme Court's review of a defendant's assertion of the right as a measure of the point at which the deprivations occasioned by the trial delay begin to outweigh the benefits to the defendant. The Court describes the function of this factor stating:

> The strength of [a defendant's] ... efforts [to assert his speedy trial right] will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain.

Barker, 407 U.S. at 531, 92 S.Ct. at 2192. A defendant's late assertion of

the right, regardless of the reason, is properly accorded less weight than an early assertion of the right because the reason that contributed to the delay generally has a concomitant effect of lessening the severity of the deprivation experienced by the defendant from the trial delay. Here, for instance, Doggett's ignorance of the indictment and delayed arrest explain his failure to assert the right sooner, but also protected him from suffering the mental anguish associated with being accused of criminal activity and the physical restraints on his liberty that may have been occasioned by an early arrest.[11]

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[11] Concededly, the speedy trial right protects other interests, such as the societal desire to bring alleged criminals quickly to trial and a (Footnote Continued)

Although Doggett's failure to assert his right to a speedy trial soon after his indictment will not inure to his benefit, it will not be weighed against him because he did not know of the indictment until he was arrested. The magistrate, therefore, correctly weighed Doggett's assertion of the right as a neutral factor in the Barker analysis.

Prejudice to the Defendant

In Ringstaff, the Eleventh Circuit held that a "defendant does not have to

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(Footnote Continued)
defendant's ability to present an unimpaired defense. Barker, 407 U.S. at 519-20, 532, 92 S.Ct. at 2186-87, 2193. Both of these interests are addressed by other factors in the Baker analysis. Furthermore, as with the other three factors, a defendant's failure to establish an early assertion of the right is not dispositive of his claim of a speedy trial violation. Id., 407 U.S. at 533, 92 S.Ct. at 2193.

show actual prejudice by delay ... if the first three [Barker] factors weigh heavily against the Government." 885 F.2d at 1543; see Mitchell, 769 F.2d at 1547; Dennard, 722 F.2d at 1513. Here, only the length of the delay weighs heavily against the government; therefore, an inquiry into the prejudice suffered by the defendant as a result of the delay is mandated.

The fact that the other two factors did not weigh heavily against the government, however, does not make them irrelevant to the speedy trial analysis. The Supreme Court has stated that the four factors

> are related ... and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Barker, 407 U.S. at 533, 92 S.Ct. at 2193; see Mitchell, 769 F.2d at 1546; Dennard, 722 F.2d at 1512. Therefore, in assessing prejudice it is important to consider the strength of the showing the defendant made on the other three factors. Where, as here, two of the factors weigh against the government and none of the factors favor the government, the defendant's showing of prejudice need not be as strong as if the majority of the factors had weighed against the defendant.[12]

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[12] Doggett's assertion that the defendant does not bear the burden of establishing prejudice when the other three factors do not weigh heavily against the government is erroneous. The Eleventh Circuit has consistently placed that burden on the defendant. See, e.g., Ringstaff, 885 F.2d at [183] (defendant must "prove prejudice" unless three factors weigh heavily against

(Footnote Continued)

In addition to considering the first three Barker factors in evaluating prejudice, a court should also weigh the three central policies underlying the right to a speedy trial; the prevention of undue and oppressive incarceration prior to trial; the minimization of anxiety and concern accompanying public accusation; and the prevention of injury to the accused's ability to defend himself. Loud Hawk, 474 U.S. at 312, 106 S.Ct. at 654; Barker, 407 U.S. at 532, 92 S.Ct. at 2193; Ringstaff, 885 F.2d at 1545. The first two policies underlying the right to a speedy trial are not implicated in this case. Doggett

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(Footnote Continued)
government); Mitchell, 769 F.2d at 1548 (defendant "must show actual prejudice" unless three factors weigh heavily against government); Dennard, 722 F.2d at 1513 (defendant must "demonstrate actual prejudice" unless three factors weigh heavily against government).

was never subject to pretrial incarceration and could not have suffered any "anxiety and concern" relating to his indictment until he first learned of it in September, 1988.

Doggett alleges that his ability to defend himself was impaired by the trial delay because he can no longer be sentenced under the lenient Young Adult Offender statute due to his age and the repeal of the act. See United States v. Black, 416 F.Supp. 59, 62 (M.D. Fla. 1976) (loss of Young Adult Offender status constitutes prejudice). Even if we recognized the loss of Young Adult Offender status as an adequate basis for establishing prejudice, the magistrate correctly found that Doggett failed to show his entitlement to the Act's protection. Doggett's eligibility

for the Act ended on June 10, 1982, on the eve of his twenty sixth birthday. See 18 U.S.C. §4216. From shortly after his indictment to his twenty sixth birthday, Doggett was absent from the United States due to a combination of his voluntary travel abroad and his incarceration in Panama for drug smuggling. Therefore, any prejudice resulting from a loss of this favored status is directly attributable to the conduct of the defendant rather than any action of the government. In fact, during this period, the government had procured an agreement to expel Doggett from Panama and was waiting for the Panamanian authorities to carry out their promise.

The defendant also argues that he was prejudiced by the loss of tape recordings of conversations with DEA

agents. He contends that the loss deprived him of potentially exculpatory evidence and of his ability to confront these witnesses with their prior statements. The magistrate properly rejected this ground as too speculative. Absent some proof that the destroyed evidence was exculpatory or that the evidence was destroyed in bad faith, we are unable to find that its absence impaired Doggett's defense. Cf. Arizona v. Youngblood, 488 U.S. 51, ___, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988); Marion, 404 U.S. at 325-26, 92 S.Ct. at 466; Redman v. Dugger, 866 F.2d 387, 389-90 (11th Cir. 1989).

Furthermore, in Mitchell, we rejected a similar assertion of prejudice based on the destruction of taped conversations because, in part, we agree with the district court that

"there were other means and methods of producing that evidence by those present who heard the tape." 782 F.2d at 1544. Here, the individuals who appeared on the tape (Driver, the informant, Doggett, and his codefendants) were all available to testify as to the conversations recorded. Since the government carries the burden of proof in a prosecution, the loss of the tapes is far more likely to have prejudiced the government's ability to convict Doggett than impaired Doggett's inability to defend himself. See Arizona v. Youngblood, 488 U.S. at ___, 109 S.Ct. at 338 (Stevens, J., concurring); Loud Hawk, 474 U.S. at 315; 106 S.Ct. at 656. Doggett's remaining allegations of prejudice are speculative and meritless. The lower court's finding that Doggett failed to make an

adequate showing of prejudice is, therefore, not clearly erroneous.

CONCLUSION

Doggett has failed to establish a violation of his constitutional right to a speedy trial because he cannot show either that the first three Barker factors weigh heavily in his favor or actual prejudice. The judgment of the district court, is therefore, AFFIRMED.

CLARK, Circuit Judge, dissenting:

After conceding that none of the four factors relevant to a speedy trial claim favor the government, and two of the factors are in Doggett's favor, the majority denies his sixth amendment speedy trial claim because he cannot show prejudice. Because I think that the majority's approach is inconsistent

with the requirements of Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), I dissent.

After setting out the four factors applied by the majority, the Barker Court explained how a court should consider these factors:

> A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right....
>
> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

407 U.S. at 533, 92 S.Ct. at 2193 (footnote omitted) (emphasis added). The majority ignores this directive and denies the claim because Doggett cannot show prejudice. The majority abdicates its responsibility to "engage in [the] difficult and sensitive balancing process." Id. The four factors in this case "should be considered together with [the] other circumstances [that are] relevant" to Doggett's claim. When this balancing is done fairly and equitably, Doggett is entitled to relief.

As noted above, there are two Barker factors favoring the defendant. The first is the length of the delay. As the majority notes, the five-year delay in Barker was characterized as "extraordinary." Slip Op. at 3839, at ___. The delay in this case was eight and one-half years. In Bell v. Lynaugh,

828 F.2d 1085, 1094 (5th Cir. 1987), the court characterized an eight-year delay as "unwarranted and presumptively prejudicial." Similarly, in Garcia Montalvo v. United States, 862 F.2d 425, 426 (2d Cir. 1988), the court noted that "eight years is an inordinate amount of time in which to bring an indicted person to trial." I would place great weight on this factor in conducting the Barker balancing.

As the majority concedes, the government's only justification for this inordinate delay is that it was not guilty of "bad faith or a dilatory purpose." Slip Op. at 3849, at ___. According to the majority, the government was merely "negligent." The majority correctly recounts the government "attempts" to capture Doggett. It is evident on its face that

the government did not capture Doggett because he was not worth the effort. He was a small fish in the ocean of those involved in the drug trade. Given that the government missed many opportunities to apprehend Doggett, I would consider its conduct in this case grossly negligent and would weigh this factor heavily against the government.[13]

I agree with the majority that Doggett cannot show any concrete examples of how he was prejudiced.

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13 I do not mean to suggest that the government has to leave no stone upturned when attempting to apprehend those accused of relatively minor crimes. I realize that the government must deploy its law enforcement resources where they will be the most effective. Nevertheless, because criminal defendants are entitled by the constitution to a speedy trial, the government should not be allowed to use negligence to justify an eight-year delay when it has missed several opportunities to apprehend a criminal defendant.

Nevertheless, as Barker clearly holds, this showing is not "necessary" to make out a speedy trial clause violation. 407 U.S. at 533, 92 S.Ct. at 2193. The defendant cannot always show all of the prejudice he faces when the government waits over eight years to bring him to trial. As Justice Powell notes in Barker:

> There is also prejudice if defense witnesses are unable to recall accurately events of the faded past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

Id. at 532, 92 S.Ct. at 2193. This unprovable prejudice is one of the reasons why the majority's mechanistic approach is inconsistent with the sixth amendment guarantee.

There are other circumstances in this case which should be taken into account in determining Doggett's

entitlement to relief. Because Doggett did not know he was indicted until he was arrested in 1988, he could not assert his right to a speedy trial earlier. In this case, Doggett has been leading "a normal, productive, and law-abiding life" since his return to the United States. Slip Op. at 3838, at ___. It is reasonable to expect that after a certain point in time one will not have to answer for actions taken in the past. Generally, this protection is provided by the five-year statute of limitations in which "Congress has codified the policy that a person need not remain indefinitely in jeopardy for allegedly illegal acts." See Mitchell, 769 F.2d at 1547 (applying 18 U.S.C. §3282). While the fact that the defendant does not learn about the charges until after the limitations

period has expired does not automatically amount to a speedy trial violation, it is "another factor" that should be taken into account. Id. at 1547, 1548.

After balancing these factors, even after taking into account the Supreme Court's caution against an "overzealous application" of the "extreme remedy of dismissal," Barker, 407 U.S. at 522 & n. 16, 92 S.Ct. at 2188 & n. 16, Doggett was entitled to a dismissal of the charges against him. That society's interest in trying Doggett is insignificant is evident by the government's weak attempts to apprehend him. I would reverse.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-3298

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARC GILBERT DOGGETT,

Defendant-Appellant.

On Appeal from the United States
District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion July 19, 1990, 11th Cir., 198__, _____F.2d _____).

(Sep 12 1990)

Before: KRAVTICH and CLARK, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in Regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit

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* Hon. C. Clyde Atkins, Senior U.S. District Judge for the Southern (Footnote Continued)

Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

(Footnote Continued)
District of Florida, sitting by designation.